

2014 IL App (2d) 140321-U
No. 2-14-0321
Order filed September 29, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

HENRY SULLIVAN and VERNETTE SULLIVAN,)	Appeal from the Circuit Court of Lake County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 12-CH-687
)	
PEGGY KANABLE, KEN KANABLE, and JAN KANABLE,)	Honorable
)	Luis A. Berrones,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendants summary judgment on plaintiffs' claim for an injunction against defendants' alleged discharge of untreated wastewater, as plaintiffs' evidence supported mere speculation that defendants indeed were discharging waste.

¶ 2 On February 10, 2012, plaintiffs, Henry and Vernetta Sullivan, filed a two-count complaint in the circuit court of Lake County against defendants, Peggy, Ken, and Jan Kanable. According to the complaint, the Sullivans own and occupy a parcel of residential lakefront property on McGreal Lake in Antioch. Peggy Kanable owns an adjacent parcel of property on

the lakefront. She and her parents, Ken and Jan Kanable, live on the property. In count I of their complaint, the Sullivans sought to determine the boundary between the two parcels. In count II, the Sullivans sought to enjoin the Kanables from discharging untreated wastewater from their property into the lake. The trial court entered a summary judgment for the Kanables on count II of the complaint and later entered a written finding that there was no just reason to delay enforcement or appeal. The Sullivans argue on appeal that a genuine issue of material fact exists that precludes summary judgment. We affirm.

¶ 3 In count II of their complaint, the Sullivans alleged, on information and belief, that, when the residence on the Kanable property was built in 1965, a clay drain tile or pipe ran from the residence to the lake. According to the complaint, at some point in the 1970s Henry Sullivan helped Ken Kanable repair a broken drain tile located next to the residence on Kanable property. The Sullivans alleged, on information and belief, that that tile was the one mentioned above that connected the residence to the lake. In 1997, Lake County health department (Health Department) employees inspected the property and found that wastewater from sinks, a shower, and laundry facilities drained directly into the lake, in violation of a Lake County ordinance. On August 21, 1997, the Health Department issued a notice of violation. The Sullivans alleged that “[s]ince that date, and up to the present time, the Kanables have maintained a pipe which goes directly from the basement of the residence underground to McGreal Lake, and from time to time discharges waste water, including laundry waste water, directly into the lake.”

¶ 4 In support of their motion for summary judgment, the Kanables contended that, after the 1997 notice was issued, they brought their property into compliance with the applicable Lake County ordinance and passed numerous Health Department inspections prompted by complaints from the Sullivans that the Kanables were discharging wastewater into the lake. The Kanables

submitted the affidavit of Peggy Kanable, who averred that there was no underground pipe on the property that drained wastewater from the residence into the lake. According to the affidavit, the Health Department had inspected both the interior and the exterior of the Kanables' residence on multiple occasions, but had not issued a violation notice since 1997.

¶ 5 As exhibits to their motion, the Kanables submitted written reports prepared by (1) Health Department officials who investigated the Sullivans' complaints and (2) a privately retained licensed environmental health practitioner, Terry B. VanderMeersch. A report from an investigation conducted by the Health Department in 1999 indicated that the investigator inspected the plumbing in the basement and found a floor drain that discharged outdoors at a point roughly 30 feet from the shoreline. However, all sewage piping was connected to the main sewer line and the investigator observed no sewage surfacing at the septic field on the property and no evidence of sewage at the shoreline.

¶ 6 Another report indicated that in 2003 the Health Department investigated a complaint of soap suds and algal growth in the lake. The investigator did not find any pipe emerging from the house that could discharge laundry waste. (No inspection was conducted inside the house.) After speaking with a colleague, the investigator advised the Sullivans that the algal growth and the suds were natural phenomena.

¶ 7 A report from 2004 detailed the Health Department's investigation of another complaint that laundry waste was being discharged into the lake. The investigator reported that the Kanables showed her the location of their septic system and of a clearwater drainage pipe originating at the Kanables' house and discharging water at a point about 50 feet from the lake. The Sullivans advised the Health Department that that pipe was not the one they were concerned about. Although fencing limited the inspector's access to the shoreline, from what the inspector

was able to observe, she did not locate any other pipes. Subsequently, a different investigator inspected the plumbing inside the house. She confirmed that the laundry discharge was connected to the main sewer line. The report further stated as follows:

“No other sump pumps except for one for footage drain. Clear water only that discharges to the side of the house. [Ken Kanable] ran water in sink where laundry discharge empties to, then that drains into a sealed ejector pit that is hooked into the main sewer line that connects to the septic system. We also walked the pasture, no pipes present, there are two natural springs which were tested for laundry discharge *** and came back undetected for laundry detergent. Walked down at the lakeshore, no pipe visible along shore and no signs of laundry discharge at lake or any type of discharge.”

¶ 8 A report from a Health Department investigation in 2011 indicated that a new septic system had been installed. The investigator noted that the only pipe leading out of the house was connected to the new septic tank and that “[t]he septic contractor said that he did not see any other pipes leading out of the house other than the sewage pipe that was connected to the septic tank.” The investigator also noted that laundry wastewater drained into a utility sink that was connected to an ejector pump that discharged the water into the sewer line. The investigator stated that “[t]here were no valves or other connections that may discharge sewage or laundry water out of the house.” The investigator subsequently placed tracing dye into the basement floor drain and flushed it with water. There were no signs of dye in the lake.

¶ 9 VanderMeersch’s report indicated that he had been contacted by the Kanables’ attorney and asked to inspect their property to determine whether laundry waste was being discharged into the lake. VanderMeersch visually inspected the home’s plumbing. VanderMeersch noted that the washing machine, which had previously been in the basement, was located on the first

floor. According to the report, “[f]rom the basement, all visible wastewater pipes (including the washing machine’s) are connected to the [four-inch] sewer line that exits the back of the house.” VanderMeersch placed tracing dye into the basement floor drain, which drained into a sealed sump outfitted with a sump pump. Dye was visible in the sump pit where it was pumped into the sewer line. VanderMeersch found dye in the septic tank. Upon inspecting the backyard and the shoreline, VanderMeersch did not observe dye surfacing onto the ground or into the lake. Nor did he observe the presence of dye when he conducted a follow-up inspection four days later.

¶ 10 In response to the summary-judgment motion, the Sullivans submitted the affidavit of Henry Sullivan. He averred that: (1) in the early 1970s he helped the Kanables repair a four-inch clay pipe buried on their property; (2) he had observed water discharge in two locations at the shoreline in 2012 and had “personally observed specific areas of the Kanables [*sic*] vegetation remain green during the extreme drought near the shoreline of the Kanable property indicating a discharge of water from the Kanable home”;¹ and (3) he had “observed on numerous occasions soap suds in the lake immediately adjacent to the Kanables’ property.”

¶ 11 The Sullivans also submitted a report of a “Limited Environmental Site Assessment” (Limited ESA) conducted by Symbiont Science, Construction, and Engineering, Inc. (Symbiont). The report concluded that “[b]ased on the presence of apparent optical brighteners in the water column, the presence of surfactants in sediment beneath McGreal Lake, and the presence of surfactants in shoreline soil samples, this Limited ESA appears to have identified residual impacts to McGreal Lake from optical brighteners and surfactants commonly associated with detergent wastewater.”

¹ Although the affidavit stated that photographs of these conditions were attached as exhibits to the affidavit, we find no such photographs in the record on appeal.

¶ 12 We begin our analysis with a brief review of the principles governing the entry of summary judgment. This court has recently noted as follows:

“The purpose of summary judgment is to determine whether a genuine issue of material fact exists. [Citation.] Summary judgment is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. [Citations.] In determining whether a genuine issue of material fact exists, the court views the evidence in the light most favorable to the nonmovant. [Citation.] Since summary judgment is a drastic remedy, it should be granted only when the right of the movant is clear and free from doubt. [Citation.] Review of a trial court’s grant of summary judgment is *de novo*. [Citation.]” *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶ 69.

¶ 13 Count II of the Sullivans’ complaint sought relief pursuant to section 5-12017 of the Counties Code (55 ILCS 5/5-12017 (West 2012)), which provides, in pertinent part, as follows:

“In case *** any building, structure or land is used in violation of [division 5 of the Counties Code] or of any ordinance, resolution or other regulation made under authority conferred thereby, the proper authorities of the county or of the township in which the building, structure, or land is located, or any person the value or use of whose property is or may be affected by such violation, in addition to other remedies, may institute any appropriate action or proceedings in the circuit court to prevent such unlawful *** use, to restrain, correct, or abate such violation, *** or to prevent any illegal act, conduct, business, or use in or about such premises.”

The Kanables do not dispute that discharging laundry wastewater is prohibited by a Lake County ordinance to which section 5-12015 applies, so the salient question here is whether there is a genuine issue as to the allegation that the Kanables had been discharging laundry wastewater into the lake.

¶ 14 A defendant moving for summary judgment bears the initial burden of either “affirmatively disproving the plaintiff’s case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law *** or (2) *** establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action ***.” [Citation.]” (Internal quotation marks omitted.) *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. “If the moving party meets the initial burden of production, then the burden of production shifts to the nonmoving party, who must then present some factual basis that would arguably entitle it to judgment as a matter of law.” *Id.*

¶ 15 The Kanables met their initial burden by presenting evidence showing that, since 1997, they have not improperly discharged laundry wastewater into the lake. The Kanables showed that their property had been inspected on several occasions by the Health Department and that the Health Department’s investigators found that the washing machine drained through sewer pipes into the Kanables’ septic system. Prior to 2011, an investigator noted that a floor drain in the basement discharged *clean* water onto the Kanables’ property. However, a 2011 inspection report indicated that the only pipe leaving the house was connected to the septic system. In addition, a licensed environmental health practitioner retained by the Kanables observed that the floor drain fed into the sump pit. Dye testing showed that water in the sump pit was pumped to the septic system.

¶ 16 The Sullivans submitted evidence from which it might be inferred that laundry wastewater was being discharged into the lake, but they failed to provide evidence directly establishing, or creating a reasonable inference, that any wastewater originated from the Kanables. In his affidavit, Henry Sullivan stated that he had seen a buried pipe on the Kanables' property in the 1970s. However, there is no evidence that the pipe is presently connected to the plumbing in the residence. Furthermore, although Henry stated that, in 2012, he had seen water discharge in two locations on the Kanables' property at the shoreline, he did not indicate whether he saw the water being discharged from a pipe or whether there were any signs that it was laundry wastewater. Finally, the presence of green vegetation on the Kanables' property, near the shoreline, during periods of drought, does not indicate the discharge of wastewater. The vegetation in question might have been drought-resistant or might have received water from natural springs or some discharge of clean water. In ruling on a motion for summary judgment, “[a]ll reasonable inferences must be drawn in favor of the nonmoving party [citation], but where, ‘from the proven facts[,] the nonexistence of the fact to be inferred [is] just as probable as its existence, then the conclusion that it exists is a matter of speculation, surmise, and conjecture, and the trier of fact cannot be allowed to draw it.’ [Citation].” *Mann v. Producer’s Chemical Co.*, 356 Ill. App. 3d 967, 974 (2005). The evidence provided by the Sullivans supports nothing more than speculation that any laundry wastewater in the lake originated from the Kanables' property. Accordingly, the Kanables' evidence stands uncontroverted and they are entitled to judgment as a matter of law.

¶ 17 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 18 Affirmed.